No. 20,719

In the

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,
Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an unincorporated association, et al.,
Appellees.

Petition for Rehearing

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To the Honorable Walter L. Pope, Frederick G. Hamley and Charles M. Merrill, Judges of the United States Court of Appeals for the Ninth Circuit.

Appellee Pacific Maritime Association respectfully petitions the Court to reconsider its decision and supporting opinion dated August 28, 1967, to call for further written and oral argument on issues involved, and to request the Chief Judge to convene the Court *en banc* for purposes of the requested rehearing.

We believe that the panel has issued an opinion without having had a sufficient opportunity to consider and weigh issues of fundamental significance "as there evolves in this field of labor-management relations that body of federal common law of which *Lincoln Mills* spoke".[1] The opinion suggests that this common law includes propositions that would do grave and extensive harm to the collective bargaining process and that would open the courts to an untoward mass of litigation. The major issues in such invited litigation should be left to the private law and tribunals of industry-union contracts, thus permitting them to be decided in accordance with the labor relations policy of the United States that the run of the mill employer-employe problems shall be resolved through the collective bargaining process. Other issues invited into the courts, as to discharges for anti-union activity, should continue to be resolved only through the Labor Board's process. If the federal courts were opened, as this Court's opinion opens them, it would burden them with matters that are of such a character and number as to preclude their resolution through the existing judicial system. We submit that on rehearing, after considering further oral and written argument, the Court will conclude that its August 28 decision is unwarranted and the Court will set down principles of this common law that will positively contribute to the effectiveness of the courts in their usual areas, to the effectiveness of the collective bargaining process as a significant element of the economy of the nation, and to the utilization of the Labor Board in its traditional area of expertise.

We recognize that grave burdens are placed on an appellate court in considering the complex issues here presented. This is

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1. *Dowd Box Co. v. Courtney*, 368 U.S. 502, 514 (1962) referring to *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957).

particularly true where, as here, they come up on appeal from a summary judgment entered prior to answer, admissions, depositions, discovery, pre-trial and other procedures for clarifying the legal issues and more precisely and accurately stating the facts that are not open to dispute and are critical to a decision of the case. However, if the August 28 opinion is permitted to stand, a more onerous and socially unjustifiable burden is placed on the parties, the collective bargaining process and the lower courts. We believe that the district court correctly concluded that the fifty-odd plaintiffs were lawfully terminated, that it would be against the interests of the many individuals for them to spend time and money in further steps in a hopeless case, and that neither the courts nor the defendants should be required to go further into a morass of pleading, discovery and pre-trial procedures that would serve only to clarify that there was no violation of the collective bargaining contract.

Undisputed facts show that the appellants are attacking discharges for cause that were permitted by the collective bargaining contract.

We submit that, with the one exception stated in the second paragraph hereof, the federal common law of labor relations does not authorize the courts to determine whether employes were *in fact* discharged for cause if the cause is a basis for discharge under the collective bargaining contract. Here, the decisions of the joint committee discharging each appellant for one or more of certain reasons - cheating ("chiseling") in the work assignment process to get an unfair portion of the available work, undue absenteeism from work, excessive delays in paying bills for use of the dispatch hall, intoxication and pilferage - are under attack. As we show below, these reasons were proper grounds for discharging longshoremen under contract terms not questioned in this case. Here, the governing rule is the ordinary rule that decisions of the grievance committee having jurisdiction shall govern.

The joint labor relations committee, which discharged the appellants and heard the attacks on these actions and affirmed them, is analogous to many government agencies - and also to private organizations such as unions or other associations - in its multiplicity of functions. It has the legislative function of deter-

mining policy in agreeing upon the formal and informal rules, practices and other guides necessary to supplement the generalities or constitution-type rules set out in the basic contract document, in filling in the interstices in that document, and in otherwise reaching policy decisions in matters not of such magnitude or foreseeability as to have been resolved in the basic negotiation process. This joint committee also has the executive function of directing the operations of the halls for dispatching longshoremen to their daily work assignments, of selecting and discharging the longshoremen using the hall, and of making related policy decisions of an executive character. It has the administrative function of making the basic contract and the supporting rules, practices and other supplementary guides an effective machinery for governing the employer-employe relationship and resolving both the routine disputes as to contract meaning and the day-by-day issues that make the basic collective bargaining process a living, continuing activity throughout the contract period. Finally, the joint committee has the judicial function of deciding the merits of claims raised by individuals that they have been denied some substantive right under the contract (as that requiring a certain rate of pay) or some procedural protection (as that against certain types of discrimination) and of adjudicating such claims even where it is claimed that it, rather than an employer or union, has denied such a right or protection.

The governmentally imposed limitation on the power of this multi-function agency is that set out in *Humphrey v. Moore,* 375 U.S. 335 (1964), and *Vaca v. Sipes,* 386 U.S. 171, 17 L.ed 2d 842 (1967). The labor relations committee cannot perpetrate a contract violation in its administrative function (*Humphrey*) or its adjudicative function (*Vaca*) through the union's breach of the duty of fair representation. Invidious or hostile discrimination that causes a contract violation is actionable. Otherwise the grievance machinery decision is "final and binding upon the parties, just as the contract says it is".[2]

The Court's holding that failure to exhaust the grievance-arbitration procedure is not fatal to appellants' case is based on the proposition that "the action of the Joint Coast Labor Rela-

2. *Humphrey v. Moore,* 375 U.S. 335, 351 (1964) citing *Drivers Union v. Riss & Co.,* 372 U.S. 517 (1963).

tions Committee [of December 18, 1964 (R. 84-91)] would be final according to the contract" if appellants could establish their argument that they were claiming only something other than § 13 discrimination (printed op. p. 10). The Court should now take the next step in deciding that if this argument were established, the courts would be obliged to accept that action as final in this proceeding. The Supreme Court opinions cited establish that the failure and inability of plaintiffs to show invidious or hostile discrimination precludes judicial review of the decision that the contract says is final and binding.[3]

The opinion is contrary to established law.

The August 28 opinion overrules earlier decisions requiring that such invidious or hostile discrimination be pleaded and shown in some detail. *Hardcastle v. Western Greyhound Lines,* 303 F.2d 182 (9 Cir. 1962), so holds. The instant opinion is based on the proposition that there might be some discrimination. Not even is there an indication that it must be of such a hostile or invidious nature; much less is there any requirement that the factual nature of it be set forth. If the federal common law is to be changed so as to make such precision unnecessary, the question should be reheard in detail, and *en banc,* before such a far-reaching decision is entered overruling the cited Supreme Court and Ninth Circuit opinions.

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3. It would seem that the August 28 opinion confuses the distinction between discrimination and discharge. When an employer or a labor relations committee determines that certain persons should be discharged and certain other persons should not be discharged, there is an act of discrimination in making this decision. Thus there was discrimination in the action of selecting 97 longshoremen for discharge while advancing in registration the 450 or so remaining from the original group of 750 Class "B" longshoremen registered in 1958. The mere discrimination of treating some men one way and others another way is, however, insufficient to establish a basis for judicial intervention unless the courts are going to decide the merits of every discharge. The action of discriminating between the persons selected for discharge and those not selected for discharge is open for judicial consideration only if the motivation for the action was invidious or hostile within the meaning of these terms, which has developed in the many opinions from *Steele v. Louisville & Nashville R.R. Co.,* 323 U.S. 192 (1944) through *Vaca v. Sipes,* 386 U.S. 171, 17 L.ed. 2d 842 (1967). Initially this meant racial discrimination. There have been indications that it may include other types of invidious discrimination but the cases do not define what falls within this area. It is clear, however, that a motivation that is highly unacceptable to society is necessary in order to justify judicial intervention in discrimination in discharging employees.

The Court's conclusion will greatly disturb the collective bargaining process if it stands. That process exists to provide speedy, final disposition of employment-related issues through recognition of the extraordinary character of the union's status as the employes' exclusive representative for collective bargaining purposes.[4] This function cannot be fulfilled unless grievance machinery decisions as to the facts and the contract meaning are open to judicial review only in rare cases where *Steele* type discrimination is properly before the court. Such discrimination needs to be alleged in the pleadings, where a demand therefor is made; it needs to be spelled out in some precise detail in some way, as in factual affidavits, where the issue as to such discrimination is critical in summary judgment proceedings; it needs to be clear in the findings after full trial. Only if those attacking the collective bargaining process are required to bear such burdens of pleading, discovery and proof, can the courts perform their function of protecting the process itself. The courts cannot take on the task of hearing the merits of every discharge of a person who imagines himself to be, or even actually is, an anti-Establishment union member. The courts should see only that the tribunals with jurisdiction do not abuse it by violating the contract through invidious or hostile discrimination.

For the reasons above-stated and for the reasons expressed in the petition of appellees International Longshoremen's and Warehousemen's Union, et al., we request the Court to grant a rehearing.

Dated: September 27, 1967.

Respectfully submitted,

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4. For example the employer is obligated under the Act to deal exclusively with the union and may not deal directly with employes themselves. *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 679, 684 (1943). Furthermore: "The Act imposes no obligation upon a bargaining agent to obtain employee ratification of a contract it negotiates in their behalf." *North County Motors, Ltd.*, 146 NLRB 671, 674 (1964). Cf. *N.L.R.B. v. Wooster Division of Borg Warner Corporation*, 356 U.S. 342 (1958); *Houchens Market of Elizabethtown, Inc.*, 155 NLRB 729 (1965).

CERTIFICATE OF COUNSEL

Dennis T. Daniels, attorney for appellee Pacific Maritime Association, certifies that he has read and knows the contents of the foregoing petition and that said petition in his judgment is well founded and is not interposed for the purpose of delay.

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September 27, 1967